IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1543 OF 2003

Mr.V.K. Bhaiya ...Petitioner
V/s.
Mrs.Hina Umesh Solanki & Anr. ...Respondents

Mr.A.P. Mundargi, Senior Counsel i/b. M/s.Sanjay Udeshi & Co. for the Petitioner.
Mr.P.S. Hingorani, APP for State.

CORAM : V.M. KANADE, J.

DATED : AUGUST 14, 2007

P.C. :-

. Heard the learned Senior Counsel for the petitioner.

2. The petitioner takes exception to the order of issuance of process by the Metropolitan Magistrate, 16th Court, Ballard Pier, Mumbai, in C.C.No.3698/S/2003. It is necessary to narrate the chequered history in respect of facts of this case. The application was filed by the respondent in the Court of Additional Chief Metropolitan Magistrate, 33rd Court, Ballard Pier, Mumbai, in a case No.723/S of 1996 for an offence under Section 138 read with Section 141 of the Negotiable Instruments Act. The

said complaint was filed through her Constituted Attorney. After recording the verification statement of the constituted Power of Attorney, the learned Magistrate was pleased to issue process against the present accused. Against this order, the petitioner preferred a revision application in the Court of Sessions of Greater Bombay. It was submitted in the said revision application that in view of the judgment of this Court in the case of **Dr.Pradeep Mohanbay V/s. Mr.Minguel Carlos Dias reported in 2000 Volume 102(1), Bombay L.R. 908,** a constituted Power of Attorney did not depose or give evidence on behalf of the complainant. It was submitted that therefore, the process which was issued by the Magistrate was illegal since it was on the basis of the verification of the Constituted Power of Attorney. The Additional Sessions accepted this submission and the order dated 17.8.2000 passed by the Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai, was set aside. Against this order, the petitioner preferred this Criminal Writ Petition No.1543/2003.

3. It is necessary to point out that the Sessions Court had, in fact, remanded the matter to the Court of Magistrate and direction was given to the complainant to appear before the Magistrate on 25.7.2003 for issuance of process. A direction was, however, given that if the complainant failed to appear in the trial court, it would be at liberty to pass an appropriate order in respect of issuance of process. This Court was pleased to issue notice before admission and was also pleased to grant ad-interim relief in terms of prayer clause (b) by order dated 4.11.2003.

4. In the meantime, before ad-interim relief could be passed by this Court on 4.11.2003, the Metropolitan Magistrate had recorded the verification of the complainant and had issued process. An application was made by the petitioner for amendment of the petition for bringing the subsequent events on record and the order of issuance of process was also challenged by amending prayer clauses (a) and (b).

5. Shri Mundargi, learned Senior Counsel appearing

on behalf of the petitioner submitted that in view of the judgment of this Court, the petitioner was willing to file a revision application before the Sessions Court. However, this request was declined on account of the fact that the petition is pending in this Court since 2003 and ad-interim relief was obtained by the petitioner on 4.11.2003. This Court felt that it was futile, therefore, to relegate the petitioner to the Sessions Court for the purpose of filing revision application.

6. Shri Mundargi, learned Senior Counsel appearing on behalf of the petitioner submitted that the order of issuance of process was obtained illegally, firstly, in view of the law and the bar laid down by Section 468 of the Code of Criminal Procedure which prohibits the Magistrate to take cognisance of an offence beyond the period of limitation. He submitted that the complaint was filed on 13.6.96 and the process was issued on the said complaint. An application was made by the petitioner for recall of process and the said order was recalled by the Magistrate on 17.8.2000. Against this

order, the complainant preferred revision application and the Sessions Court by order dated 25.6.2003 directed the Magistrate to issue process after recording the verification of the complaint. Thereafter, the process was issued by the Magistrate. He submitted that more than seven years have elapsed from filing of the complaint as such cognisance could not have been taken.

7. This submission made by the learned Counsel appearing on behalf of the petitioner cannot be accepted. In this case, the Magistrate had taken cognisance on 13.6.96 and process was issued by the Magistrate. It is no doubt true that thereafter, the process was recalled by the Magistrate himself by order dated 17.8.2000, however, this order was challenged by the complainant in the Sessions Court in revision and his revision application was allowed and the Sessions Court directed the Magistrate to issue process after recording the verification of the complainant. This order again was challenged by the petitioner in this Court and by order dated 4.11.2003, this Court was pleased to grant ad-interim relief in terms of prayer

clause (b). However, before this date, the Magistrate had already issued process. In my view, the cognisance of this complaint had already been taken on 13.6.96 though this order was challenged by the accused-petitioner herein and later, by the complainant in the revision court, the fact remains that initially cognisance was already taken within the period of limitation. In order to appreciate the submission made by the learned Counsel appearing for the petitioner, it would be relevant to take into consideration the said provision. Section 468 reads as under :-

> **468. Bar to taking cognizance after lapse of the period of limitation-**
>
> (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
>
> (2) The period of limitation shall be -
>
> (a) six months, if the offence is punishable with fine only;
>
> (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
>
> (c) three years, if the offence is punishable with imprisonment for a term exceeding one year

> but not exceeding three years;
>
> (3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

Provisions of Section 468 have to be read with Sections 469 and 470 of the Cr.P.C.

8. In the present case, cognisance was taken by the Magistrate immediately after the complaint was filed and thereafter process was issued. Merely because thereafter the process was recalled by the Magistrate, that would not postpone the process of taking cognisance of the complaint by the Magistrate. It is no doubt true that for a brief period after the order of issuance of process was recalled by the Magistrate and the matter was remanded back by the Sessions Court directing the Magistrate to issue process, some time had lapsed. However, it cannot be said, therefore, that when the process was issued again by the Magistrate pursuant to direction which was given by the Sessions court, that the process was issued for the first time or that

cognisance was taken for the first time after 25.6.2003. The submission made by the learned Counsel for the petitioner that the complaint was barred by limitation since cognisance was taken after a lapse of seven years, therefore, cannot be accepted. It cannot be said that no cognisance of the offence was taken merely because the verification statement was set aside by the Sessions Court. This submission made by the Counsel for the petitioner, theretofore, cannot be accepted.

9. Shri Mundargi, learned Senior Counsel appearing on behalf of the petitioner herein submitted that the transaction, in question, was a money lending transaction. He invited my attention to the averments made in the complaint and also the notice which was issued by the complainant to the petitioner herein. He submitted that in the notice, it was clearly mentioned that the petitioner will have to pay 18% interest. He submitted that it was not an averment that the complainant had a money lending licence. It was submitted that in the absence of this averment, the complaint was not maintainable since the amount which

was to be paid was not towards any debt or liability. This submission also, in my view, cannot be accepted at this stage. The question whether there was existing debt or liability or whether the transaction, in question, was a money lending transaction, it cannot be decided on a mere statement made by the complainant in his complaint. This question will have to be decided by the learned Magistrate after evidence is adduced by both the parties and thereafter findings can be recorded by the Magistrate.

10. Thus, there is no merit in the submission made by the learned Counsel for the petitioner. The petition, accordingly, is dismissed.

11. The Magistrate to decide the criminal case, as expeditiously as possible and in any case, within a period of six months.

(V.M. KANADE, J.)